(Spl. - H.C.A.S. C.D., 78-e)
FARAD CONTINUATION SHEET No.
IN THE HIGH COURT OF BOMBAY AT GOA
PANAJI – GOA
APPELLATE SIDE

APPLICATION FOR APPOINTMENT OF ARBITRATOR NO. 6/2005

Office Notes, Office Memoranda of Quorum appearances, Court's orders, or directions and Registrar's orders.	Court's or Judge's Orders.

Mr. P. A. Kholkar, Advocate for the applicant.

Mr. C. A. Ferreira, Asst. Solicitor General for the Respondents.

CORAM : D.D. SINHA, J.

DATE : 18th November, 2005.

P.C.

Heard Mr. Kholkar, the learned Counsel for the applicant and Mr. Ferreira, the learned Asst. Solicitor General for the respondents. The present application is moved under Section 11(6) of the Arbitration and Conciliation Act, 1956 for appointment of an Arbitrator. The Counsel for the applicant has

contended that the applicant is a proprietor of M/s. M.N. Ninan and is a Civil Contractor. Respondent No.2 awarded work of construction of 12 nos. Type IV Staff Quarters at Alto-Porvorim, Goa to the applicant by Work Order dated May 13, 1999 and immediately thereafter, a formal agreement was executed between the respondent No.2 and the applicant.

2. Clause 25 of the said agreement is the arbitration clause which, inter alia, provides that all questions and disputes arising out of, or relating to the contract shall be referred to the sole arbitrator appointed by respondent No.1.

3. The Counsel for the applicant contended that by letter dated January 27, 2005 the applicant called upon respondent No.3 to finalise and pay the amounts claimed therein

within a period of 30 days from the date of receipt of the said letter, failing which, after expiry of the said notice period of 30 days, the applicant shall take it that respondent No.3 was not willing to pay the applicant the amount claimed by them and after expiry of the said notice period the applicant would proceed further to get the said amounts recovered by arbitration as provided in the contract.

4. The Counsel for the applicant further contended that by letter dated 31.3.2005 the applicant requested respondent No.1 to appoint an arbitrator within 30 days from the date of receipt of the said letter. In the said letter, it was stated thus :

> “Disputes and Difference have thus arisen between the parties to the contract.

> Clause 25 of the Agreement for the above work provides for settlement of Disputes by arbitration of a Sole Arbitrator to be appointed by you. We therefore hereby call upon you to appoint within a period of thirty days from the date of receipt of this letter by you, a suitable independent and impartial person as the Sole Arbitrator in order to adjudicate and settle the various disputes that have arisen between the parties to the contract as a result of the non-payment of the various claims lodged by us in our letter dated 27.01.2005."

5. The Counsel further contended that vide letter dated 4.4.2005 respondent No.2 denied the claims of the applicant and on the other hand, vide letters dated 15.4.2005 18.4.2005, respondent No.2 requested the applicant to

submit the application for appointment of arbitrator in the form provided. It is contended that respondent No.1, however, failed and neglected to appoint an arbitrator in terms of clause 25 despite the existence of the differences and disputes to which the said agreement applies. Respondent No.1 has, thus, abdicated himself of the power to appoint an arbitrator under the said agreement within the period of 30 days of service of the notice dated 31.03.2005 and the applicant has moved the present application for appoint of an arbitrator.

6. The Counsel for the respondent, on the other hand, has submitted that respondent No.1, in fact, has appointed the sole arbitrator by name Mr. Surya Prakash, Civil Engineer, in view of

the arbitration clause 25 pursuant to the request made by the applicant as referred to hereinabove on 01.10.2005 and, therefore, the application of the applicant for appointment of an arbitrator under Section 11(6) of the Arbitration Act is not maintainable and the disputes can be referred to the sole arbitrator already appointed by the respondent No.1.

7. in the backdrop of the above referred facts, it is evident that the arbitrator who is appointed by respondent No. 1 is after the application filed under Section 11(6) of the Arbitration Act and, therefore, the appointment of arbitrator by respondent No.1, in my view, is not sustainable in law and is illegal. In the instant case, in view of the arbitration clause though respondent No.1 was entitled to appoint the sole

arbitrator within the stipulated period, however, in the backdrop of the above referred facts, it is evident that respondent No.1 has abdicated himself of the power to appoint an arbitrator under the agreement and, therefore, I, hereby, appoint Mr. Justice G.D. Kamat, (Retired) as the sole arbitrator and all the disputes arising between the parties in respect of the contract, in question, are referred to the sole arbitrator who shall proceed as per the procedure applicable under the Arbitration Act.

With these observations, the application is disposed of.

D.D. SINHA, J.

ssm.